UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 5-95CR-074-C
	)	
v.	)	Filed: 12/13/95
	)	
OBERKAMPF SUPPLY OF LUBBOCK, INC.;	)	Violation:
	)	
CYRIL REASONER; AND	)	15 U.S.C. § 1
	)	
CLOWE & COWAN, INC.,	)	
	)	
Defendants.	)	

UNITED STATES' MOTION IN LIMINE

Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, and for the reasons set forth in the accompanying Memorandum, the United States hereby moves that the Court enter an Order:

1. Prohibiting the Defendants from offering evidence of the following on the basis that it is irrelevant to the antitrust violation with which the Defendants are charged:

   a. Evidence of economic justification for entering into and participating in a price fixing agreement; and

   b. Evidence of economic reasonableness of prices charged by the Defendants and their co-conspirators pursuant to the price-fixing conspiracy.

2. Prohibiting the Defendants from introducing the following evidence at trial on the ground that it is irrelevant to the charges against the Defendants and the fact finding duties of the jury:

a. Evidence related to the punishment that may be provided by law for a violation of 15 U.S.C. § 1; and

b. Evidence of the potential direct and indirect effects of a conviction of the Defendants.

3. Invoking Fed. R. Evid. 615, and therefore prohibiting potential witnesses from hearing the testimony of other witnesses in the trial, unless the witness qualifies under an exception to the rule of exclusion; and

4. Prohibiting the Defendants from providing to potential witnesses in this case, unless the witness qualifies under an exception to the rule of exclusion, transcripts of trial or pre-trial testimony given by other potential or actual trial witnesses.

Respectfully submitted,

_____
WILLIAM C. MCMURREY

_____
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CLOWE & COWAN, INC.,	)	
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Defendants.	)	

MEMORANDUM IN SUPPORT OF
UNITED STATES' MOTION IN LIMINE

Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, the United States has filed a Motion in Limine addressing certain matters capable of resolution prior to trial. This Memorandum sets forth the reasons for the relief sought and the supporting legal authority.

I.

INADMISSIBILITY OF EVIDENCE REGARDING
REASONABLENESS OF PRICES AND ECONOMIC JUSTIFICATION

The United States anticipates that the Defendants may try to introduce evidence of economic justification as a defense to the price-fixing conduct charged in the indictment, or may attempt to argue that the prices charged to their customers pursuant to the price-fixing

conspiracy were reasonable or did not harm their customers. Any such evidence and attempted arguments are irrelevant and therefore inadmissible under Fed. R. Evid. 402.

The Defendants have been charged with conspiring to fix prices, a per se violation of the Sherman Act, 15 U.S.C. § 1. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518 (1958); United States v. All Star Industries, 962 F.2d 465, 469 n.8 (5th Cir. 1992).

As a per se violation, price-fixing agreements are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business justification for their use." Northern Pacific, 356 U.S. at 5, 78 S.Ct. at 518. The Supreme Court explained:

> This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved. . . .

Id. See also United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 47 S.Ct. 377, 379-380 (1927).

Because price-fixing is presumed to be unreasonable as a matter of law, it cannot be justified or excused because the prices charged to customers were reasonable or because the conspiracy was motivated by good intentions, business necessity or a desire to benefit the public. Catalano, Inc. v. Target Sales, 446 U.S. 643, 647, 100 S.Ct. 1925, 1928 (1980); All Star, 962 F.2d at 475 n.21, citing National Collegiate Athletic Association, 468 U.S. 85, 104 S.Ct. 2948, 2964-65) ("Where there is a per se illegal price-fixing agreement, it is no defense that the

agreement at issue did not have anticompetitive effects or that Defendant's motives were beneficial.").

Thus, the per se nature of the price-fixing conspiracy makes any evidence of economic justification and reasonableness irrelevant and therefore inadmissible under Fed. R. Evid. 402.

II.

INADMISSIBILITY OF EVIDENCE REGARDING PUNISHMENT OR COLLATERAL CONSEQUENCES OF CONVICTION

In a federal criminal prosecution, the jury's sole function is to determine guilt or innocence. Evidence regarding punishment or the effects of conviction is thus irrelevant and inadmissible before the jury. The punishment provided by law upon conviction of a criminal violation is a matter exclusively in the province of the Court and should never be considered by the jury in any manner in arriving at their verdict as to guilt or innocence. See, e.g., Beavers v. Lockhart, 755 F.2d 657, 662 (8th Cir. 1985) ("Historically, the duty of imposing sentence has been vested in trial judges . . ."); United States v. Brown, 744 F.2d 905, 909 (2d Cir.), cert. denied, 469 U.S. 1089 (1984) ("[T]he fact finding necessary for sentencing is the responsibility of the sentencing judge . . ."); Turnbough v. Wyrick, 551 F.2d 202, 203 (8th Cir.), cert. denied, 431 U.S. 941 (1977) (defendant has no constitutional right to have punishment assessed by a jury). See also Pattern Jury Instr., Crim., 5th Cir., Instruction No. 1.21 (1990).

In United States v. McCracken, 488 F.2d 406, 423 (5th Cir. 1974), the Court of Appeals for the Fifth Circuit recognized that when the pertinent statute does not vest responsibility for sentencing in the jury, the jury's duty is to find facts without consideration of the potential punishment:

> Generally speaking, jurors decide the facts in accordance with the rules of law as stated in the instructions of the court. Unless otherwise provided by statute, it is the duty of the court to impose sentence, or make such other disposition of the case as required by law, after the facts have been decided by the jury.

Id. at 423, quoting Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962), cert. denied, 381 U.S. 941 (1965); see also, Rogers v. United States, 422 U.S. 35, 40 (1975); United States v. Greer, 620 F.2d 1383, 1385 (10th Cir. 1980) (Absent a statutory requirement that the jury participate in the sentencing decision, nothing is left for jury determination beyond the guilt or innocence of an accused); Chapman v. United States, 443 F.2d 917, 920 (10th Cir. 1971); United States v. Davidson, 367 F.2d 60 (6th Cir. l966); Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958).

Evidence which relates to the issue of punishment upon conviction of a criminal offense has no bearing on the only question the jury in this case will be called upon to decide, that of the guilt or innocence of the Defendants. Evidence dealing with possible fines or other collateral consequences of conviction is not probative of the issue of guilt or innocence. Since such evidence would not tend to prove or disprove any fact of consequence to the jury's determination of guilt or innocence, such evidence is not "relevant," as that term is defined by Fed. R. Evid. 401. Such evidence should, therefore, be excluded under Fed. R. Evid. 402, which specifically states that evidence which is not relevant is inadmissible.

Punishment evidence is inadmissible not only during the parties' examination of witnesses, but also in closing argument. If the issue of punishment is raised during closing argument, the trial court should instruct the jury not to consider the matter of punishment in arriving at their verdict. Gretter v. United States, 422 F.2d 315, 319 (10th Cir. l970). It is error

to tell the jury the probable or potential consequences resulting from a particular verdict. McCracken, 488 F.2d at 424-25. The disposition of the defendant is not in any case a jury issue. Pope v. United States, 372 F.2d 710, 731 (8th Cir. 1967), cert. denied, 401 U.S. 949 (1971).

Therefore, for the reasons discussed above, the United States respectfully requests that this Court rule that any evidence or argument relating to possible punishment upon, or collateral consequences of, conviction be excluded from the trial of this case.

III.

EXCLUSION OF WITNESSES

By its Motion in Limine, the United States invokes Fed. R. Evid. 615. This rule provides that, upon request by a party, the Court shall order witnesses excluded from the courtroom so that they cannot hear the testimony of other witnesses. Rule 615 alters prior practice by removing the matter from the trial judge's discretion and making it a matter of right, at the request of a party. Advisory Committee's Note to Rule 615. Exceptions to the rule of exclusion are provided for: (1) a party who is a natural person; (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

The United States requests that the Court issue an Order requiring, in addition to the exclusion of witnesses from the courtroom, that no witness or prospective witness be shown or have read to him any transcript of another witness's pretrial or trial testimony or any part thereof, unless the witness qualifies for an exception to the rule of exclusion.

While Rule 615 does not directly address the question of whether reading transcripts of another person's prior testimony would violate a sequestration order, it is

impossible to distinguish oral testimony from transcripts thereof in light of the purpose of the rule. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Supreme Court addressed this issue in a manner that suggests that it would include the reading of transcripts within the ambit of Rule 615:

> Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony . . . . Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.

384 U.S. at 359.

The Fifth Circuit, in Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981), observed that the harm that Rule 615 attempts to avoid may be even more pronounced with a witness who reads testimony than with one who hears the testimony at trial:

> The purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion. [Citations omitted]. The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony. The court properly held that providing a witness daily copy constitutes a violation of Rule 615.650 F.2d at 1373.

In light of the purpose of Rule 615, and the positions taken by the Supreme Court in Sheppard v. Maxwell, and by the Fifth Circuit in Miller v. Universal City Studios, Inc., the United States submits that the requested exclusion order should be entered.

CONCLUSION

For the foregoing reasons, the United States' Motion in Limine should be granted.

Respectfully submitted,

_____/s/_____
WILLIAM C. MCMURREY

_____/s/_____
GLENN A. HARRISON

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CERTIFICATE OF CONFERENCE

This is to confirm that on November 15, 1995, the undersigned conferred with Mr. A.W. SoRelle, Mr. Dan Hurley, and Mr. Mark Daniel concerning the above and foregoing motion. At that time, Mr. SoRelle, Mr. Hurley and Mr. Daniel authorized the undersigned to represent to the court that they opposed the motion.

_____/s/_____
WILLIAM C. MCMURREY
Attorney

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing United States' Motion in Limine, Memorandum in Support of United States' Motion in Limine, and proposed Order were mailed on the ___th day of December __, 1995, to

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_____/s/_____

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CLOWE & COWAN, INC.,	)	
	)	
Defendants.	)	

ORDER

HAVING DULY CONSIDERED the United States' Motion in Limine and the response of the Defendants,

IT IS HEREBY ORDERED that:

1. The Defendants are prohibited from offering evidence that the price-fixing conspiracy with which the Defendants are charged was justified for economic reasons; and

2. The Defendants are prohibited from offering evidence that the prices charged to customers pursuant to the conspiracy were reasonable prices.

3. The Defendants are prohibited from offering evidence or commenting on the punishment provided by law for violations of 15 U.S.C. § 1;

4. The Defendants are prohibited from offering evidence or commenting on the potential direct or indirect effects which a conviction in this case may have on the Defendant;

5. Fed. R. Evid. 615 has been invoked and, therefore, all potential witnesses in this case, unless the witness qualifies under an exception to the rule of exclusion, will be excluded from the courtroom so that they cannot hear the testimony of other witnesses;

6. The Defendants are prohibited from providing to potential witnesses in this case, unless the witness qualifies under an exception to the rule of exclusion, transcripts of trial or pre-trial testimony given by other potential or actual trial witnesses;

DONE AND ENTERED this __ day of _____, 1995.

_____
HONORABLE SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE